EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

91-978

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TERRY DEWAYNE COLEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRADLEY C. MILES
Attorney for Petitioner
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
Texas Bar Card No. 14049000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence used against Petitioner was obtained in violation of his rights under the Constitution of the United States of America ?

2. Whether the Government applied a "double standard" on Petitioner in prosecuting him for carrying a firearm during alleged drug trafficking when possession of said firearm was legal under applicable Texas Law ?

LIST OF ALL PARTIES

1. Terry Dewayne Coleman, Petitioner
2. Marvin Collins, United States Attorney for the Northern District of Texas
3. C. Richard Baker, Assistant United States Attorney
4. Delonia A. Watson, Assistant United States Attorney
5. Bradley C. Miles, Attorney for the Petitioner
6. Gerald R. Lopez, Petitioner's Attorney in United States District Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TERRY DEWAYNE COLEMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioner herein, TERRY DEWAYNE COLEMAN, respectfully petitions for a writ of certiorari to review the Judgement of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (No. 90-1972) dated August 7, 1991, therein confirming Petitioner's conviction for drug trafficking in Cause No. CR - 1 - 90 - 001 - C of the United States District Court for the Northern District of Texas, Abilene Division, has not yet been

reported; however, same is reproduced in Appendix A to this Petition. The Petition for Rehearing was denied by the Fifth Circuit Court on September 18, 1991. See Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Rules 10.1(c) and 13 the Rules of the Supreme Court. The Judgment of the United States Court of Appeals for the Fifth Circuit, confirming Petitioner's conviction in the United States District Court is dated August 7, 1991, (Appendix (A), and the Order denying Petitioner's Petition for Rehearing is dated September 18, 1991. (Appendix B).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 1254 provides in relevant parts as follows, to wit:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..." (Photocopy of U.S.C. 1254 attached hereto as Appendix C).

28 U.S.C. 1291 provides in relevant parts as follows, to wit:

> " The courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States,..." (Photocopy of U.S.C. 1291 attached hereto as Appendix D).

TEXAS PENAL CODE § 46.02 provides in relevant parts as follows,

to wit:

> "(a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.
>
> (b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor..." (Photocopy of TEXAS PENAL CODE § 46.02 attached hereto as Appendix E.)

TEXAS PENAL CODE § 46.03 provides in relevant parts as follows,

> "(a) The provisions of Section 46.02 of this code do not apply to a

person:

> (3) traveling;..." (Photocopy of TEXAS PENAL CODE § 46.03 attached hereto as Appendix E).

Vernon's Ann. Civ. St. Art. 6701d §107C provides in relevant parts as follows, to wit:

> "Sec. 107C. (a) In this section, "passenger car" includes a truck with a manufacturer's rated carrying capacity of not more than 1,500 pounds.
>
> (b) A person commits an offense if the person:
>
> (1) is at least 15 years old;
> (2) is riding in the front seat of a passenger car while the car is being operated on a road, street, or highway of this state;
> (3) is occupying a seat that is equipped with a safety belt, and
> (4) is not secured by a safety belt. ...
>
> (d) A passenger car or a seat in a passenger car is deemed to be equipped with a safety belt if the passenger car is required under Section 139E of this act to be equipped with safety belts.
>
> (e) An offense under this section is punishable by a fine of not less than $25.00 nor more than $50.00 ...." (Photocopy of Vernon's Ann. Civ. St. Art. 6701d § 107C attached hereto as Appendix F).

Vernon's Ann. Civ. St. Art. 6701d §139E provides in relevant parts as follows, to wit:

> " Sec. 139E. Every motor vehicle required by Article XV of this Act to be inspected shall be equipped with front safety belts where safety belt anchorages were part of the manufacturer's original equipment on the vehicle. Sec. 139E amended by Acts 1985, 69th Leg., ch. 804, § 2, eff. Sept. 1, 1985." (Photocopy of Vernon's Ann. Civ. St. Art. 6701d § 139E attached hereto as Appendix G).

18.U.S.C. 924(c)(1) provides in relevant parts as follows, to wit:

" Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, ... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein." (Photo copy of 18 U.S.C. 924(c)(1) attached hereto as Appendix H).

21 U.S.C. § 841 provides in relevant parts as follows, to wit:

"Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or ....

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)
(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years..." (Photocopy of 21 U.S.C. § 841 attached hereto as Appendix I).

STATEMENT OF THE CASE

The Petitioner herein, TERRY DEWAYNE COLEMAN, was convicted in Cause No. CR-1-90-001-C of the United States District Court for the Northern District of Texas, Abilene Division, on November 2, 1990 for possession of methamphetamine with the intent to distribute (18 U.S.C. 841) and carrying a firearm (pistol) during a drug trafficking offense (18 U.S.C. 924) and was sentenced to 33 months in prison on the possession charge and sixty months in possession of the firearm charge, with both of said terms to run consecutively, plus three years of supervised probation upon release from prison (Judgment of Conviction being Appendix J). The Petitioner directly appealed his abovementioned conviction to the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1291 (Notice of Appeal, Appendix K) and it is from the Judgment of said Court of Appeals, therein affirming said Petitioner's conviction on August 7, 1991 (Appendix A) and the Order of the Court of Appeals on September 13, 1991 denying said Petitioner's Petition of Rehearing (Appendix B) that he files this Petition for Writ of Certiorari pursuant to 28 U.S.C. 1254 (1). On Thanksgiving Day, November 23, 1989, the Petitioner herein was driving alone to his home in Odessa, Ector County, Texas in a borrowed 1977 Ford Thunderbird going West on Interstate 20 when he was stopped and arrested about eight miles West of Big Spring, Howard County, Texas for allegedly failing to wear a seat belt as required by applicable Texas

Law; however, testimony at the Hearing on the Motion to Suppress Evidence and during the trial of this case, the arresting officer, Department of Public Safety Trooper Weldon Jones, repeatedly said that he only had a "mere suspicion" or "hunch" that said Petitioner was not wearing a seat belt, and therefore, it is the Petitioner's belief that the original stoppage of him was illegal and in violation of his Fourth Amendment Constitutional Rights, and therefore, even if the aforementioned stoppage is found to be legal (which the Petitioner strongly and emphatically denies), then the subsequent interroga tion and search of said Petitioner was illegal and in violation of his Fourth and Fifth Amendment Constitutional Rights because said arresting officer did not give said Petitioner his Miranda Warnings prior to interrogation. The Government, at the trial of this case, prejudiced the Petitioner's rights when it was allowed to introduce evidence of alleged "drug paraphernalia" found in the trunk of the 1977 Ford Thunderbird, even though it is uncontroverted that the Petitioner did not own said vehicle or even have knowledge of the contents of the trunk of said vehicle. It is uncontroverted that at the time of the Petitioner's arrest that he was carrying on his person a pistol; however, under applicable Texas Law, the carrying of a firearm, while traveling, is permissible and justifiable under Texas Law, and therefore, the Government should not have been able to use the possession of a firearm as evidence against Petitioner in an alleged "drug trafficking" case because this imposes upon Petitioner a

"double standard" or "unequal" application of the law, namely, "fine" to use Texas Law to stop Petitioner, but not "fine" to use Texas Law in connection with possession of a firearm. No seat belt violation was ever issued.

QUESTIONS PRESENTED FOR REVIEW RESTATED

1. Whether the evidence used against Petitioner was obtained in violation of his rights under the Constitution of the United States of America?

2. Whether the Government applied a "double standard" on Petitioner in Prosecuting him for carrYing a firearm during alleged drug trafficking when possession of said firearm was legal under applicable Texas Law?

ARGUMENTS AND AUTHORITIES

1. Whether the evidence used against Petitioner was obtained in violation of his rights under the Constitution of the United States of America?

Your Honors, lend me your ears, because, yes, the Petitioner's Constitutional Rights guaranteed him, as an American citizen, by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States of America were, indeed, violated! And further, this Petition for-Writ of Certiorari should be granted because the Judgment of the Court of Appeals for the Fifth Circuit, therein affirming the Petitioner's District Court conviction, conflicts with prior applicable decisions of the Supreme Court of the United States as hereinafter mentioned. Rule 10.1(a) and (c) of the Supreme Court Rules.

In U.S. v. Sharp (1985) 470 U.S. 680, this Court stated that the Government

(or State) must have a reasonable, articulate suspicion (i.e. probable cause) before a "stop" of a citizen can legally (emphasis mine) be made; therefore, since the Petitioner in this case was stopped upon a "mere suspicion" or "hunch" then the stoppage of him on November 23, 1989 was illegal, a sham, or pretextual, and therefore, his Motion to Suppress should have been granted by the District Court as well as all other evidence introduced against him in the trial of this case should be excluded because same was "the fruits of a poisonous tree". Fourth Amendment; (See dissent in Calf. v. Hodari D., No. 89-1632)Scott v. U.S. (1978) 436 U.S. 128; Amando-Gonzales v. U.S. (1968) 5th Cir. 391 F2d 308; U.S. v. Cortez (1981) 449 U.S. 441; Delaware v. Prouse (1979) 440 U.S. 648; Silverthorne v. U.S. (1920) 251 U.S. 385; Brown v. Texas (1979) 443 U.S. 47.

In the alternative, should this Court find that the original stoppage of the Petitioner was "justifiable", then the subsequent interrogation or questioning of the Petitioner by the arresting officer, prior to advising said Petitioner of his "Miranda Rights" was illegal and all evidence obtained subsequent thereto should have been suppressed. The arresting officer stated that immediately after the Petitioner was stopped, he, the arresting officer, noted "a tray" in the back seat of the car the Petitioner had borrowed (the Petitioner questions this because the rear windows on 1977 Ford Thunderbirds are very small), and said officer further testified that he "recognized" said tray as one used to "cut

drugs" (i .e . self-incriminating evidence under Washington v. Chrisman (1982) 455 U.S. 1 and that the Petitioner was "not free to go" after said officer observed the aforementioned tray. Accordingly, the Petitioner was " under arrest" at the time the arresting officer allegedly viewed the aforementioned "incriminating" tray, and therefore, said arresting officer was obligated to advise the Petitioner at that time of his Miranda Rights, and said officer's failure to do so excluded any further testimony or evidence recovered subsequent thereto. U.S. v. Mendenhall (1980) 446 US 544. The Statement of Facts in this case reflects that the arresting officer, subsequent to his arresting said Petitioner after viewing the aforementioned tray, asked the Petitioner "What ' s that?" (referring to a tin-foil package attached to the Petitioner's elbow with a rubber band) and this Court, in effect, in Harryman v. Estelle (1980) 5th Cir. 616 F2d 870, cert. denied 449 U.S. 860 (1981) stated that the aforementioned statement was " engaging the arrestee in interroga tion" when the arresting officer, subsequent to arrest, asked the person so arrested "What's this?" in the Harryman Case and that the aforementioned question was illegal without first giving the arrested person his Miranda Warning, and because same was in violation of the Fifth Amendment to the Constitution of the United States of America; Rhode Island v. Innis (1980) 446 U.S. 1291; Miranda v. Arizona (1966) 384 U.S. 436; Berkemer v. McCarty (1984) 468 U.S. 420. The Petitioner's Constitutional Rights to "due

process of law" as guaranteed him by the Fifth and Fourteenth Amendmements to the Constitution of the United States of America were violated in the trial court when the Government was allowed to introduce alleged "drug paraphernalia" without first showing same belonged to the Petitioner or even that he was aware of same or that same was under his " care, custody, and control" since uncontroverted that the car stopped did not belong to said Petitioner. Fahy v. Connecticut (1963) 375 U.S. 85.

2. Whether the government applied a "double standard" on Petitioner in prosecuting him for carrying a firearm during alleged drug trafficking when possession of said firearm was legal under applicable Texas Law?

Under applicable Texas Law (TEXAS PENAL CODE §46.02 and 46.03) the Petitioner was legally carrying a pistol when he was "traveling" on an Interstate Highway when he was stopped on November 23, 1989; therefore, the District Court should have granted the Petitioner's Motion for Judgment of Acquittal as to the firearms charge because said gun possession was legal under the aforementioned Sections of the TEXAS PENAL CODE, and to hold otherwise is in violation of the Fourteenth Amendment to the Constitution of the United States of America because same amounts to "unequal protection of the laws", and, in fact, applies a "double standard" against Petitioner. As abovementioned the Government was allowed to apply a "double standard" against the Petitioner because, in effect, the District Court

held that the Government could "legally" use the Texas Seat Belt Law (Art. 6701d, § 107C and 139E of Vernon's Texas Ann. Civ. St.) to "justify" its stopping of the Petitioner, but, on the other hand, the District Court refused to permit the Petitioner to take advantage of TEXAS PENAL CODE §46.03 making the possession of the firearm in question legal under the aforementioned and stated TEXAS PENAL CODE Section.

CONCLUSION AND PRAYER

WHEREFORE PREMISES CONSIDERED, your Petitioner herein, TERRY DEWAYNE COLEMAN, respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

Bradley C. Miles,
Attorney for Petitioner
Post Office Box 2006
San Angelo, Texas 76902
Phone: 915-653-3688 or 658-4141
State Bar Card No. 14049000

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was sent to Ms. Deloria A. Watson, Assistant United States Attorney, correctly addressed to 1100 Commerce Street, Room 16G28, Dallas, Texas 75252-1699 via Certified Mail, Return Receipt Requested, this 27th day of December, 1991.

Bradley C. Miles

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-1972
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY DEWAYNE COLEMAN

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CR 1 90 1(1))

(August 7 , 1991)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM: *

In this drug trafficking case, Defendant-Appellant Terry Dewayne Coleman complains on appeal that his jury conviction was obtained as the result of the district court's error in failing to suppress evidence that Coleman insists was constitutionally

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.* Pursuant to that Rule, the court has determined that this opinion should not be published.

tainted. Coleman also charges that the district court erred in permitting him to be convicted for possession of firearms during a drug trafficking incident when, according to Coleman, his possession was legal under state law. Finding no reversible error by the district court, we affirm.

I.

Coleman was convicted by a jury of one count of possession with intent to distribute methamphetamine and one count of using or carrying a firearm in relation to a drug trafficking offense. He was sentenced to 33 months on the drug count and to 60 months on the firearms count, to run consecutively. He also received a three-year term of supervised release.

Prior to trial, Coleman filed a motion to suppress the evidence that a Texas Department of Public Safety (TDPS) officer (the trooper) had seized pursuant to the routine traffic stop that resulted in Coleman's arrest. The district court denied the motion following a hearing.

After entry of the order of judgment and conviction, Coleman timely filed a notice of appeal.

In reviewing a trial court's ruling on a motion to suppress based on live testimony at a hearing, the trial court's factual findings must be accepted unless clearly erroneous; and the evidence must be viewed in the light most favorable to the prevailing party. United States v. Maldonado, 735 F.2d 809,

814 (5th Cir. 1984). A district court's implicit findings are entitled to the same clearly erroneous standard of review. See United States v. Reyes-Ruiz 868 F.2d 698, 701 (5th Cir. 1989), overruled on other grounds, United States v. Bachynsky,_____ F. 2d _____(5th Cir., June 25, 1991, No. 89-2742) (en banc).

At the suppression hearing, the following facts were adduced: The trooper observed Coleman driving on Interstate 20 and noticed that Coleman's seat belt strap was not fastened but was hanging straight down beside him. The trooper drove onto the interstate from the median to verify his observation. Based on his conclusion that Coleman was in violation of the Texas statute requiring those in the front seat of a passenger automobile to wear seat belts, the trooper signaled Coleman to pull over.

After Coleman pulled over, he exited his vehicle as the trooper was ap proaching. When the two men met, the trooper noticed a brown tray on top of bundles of clothing in the back seat of Coleman's car. The trooper recognized the tray as a type of tool commonly used in the cutting and packing of drugs, so he asked to see Coleman's driver's license. As Coleman reached for it, the trooper observed a plastic bag containing a tinfoil package attached to Coleman's arm by a rubber band. Suspecting that Coleman was in possession of drugs, the trooper asked Coleman, "What's that?" in reference to the plastic

bag, whereupon Coleman jerked away from the trooper and started to run. The trooper held on to Coleman and finally subdued him with the assistance of a student observer who was riding in the patrol car.

After handcuffing Coleman, the trooper seized the plastic package and found that it contained a substance that looked and smelled like methamphetamine. The package proved to contain 27.11 grams of 24 per cent amphetamine. The trooper conducted a pat-down of Coleman, which yielded a .25 caliber semi-automatic pistol in one coat pocket and a loaded clip for the pistol in another pocket. Coleman was formally arrested and advised of his constitutional rights which, the trooper testified, Coleman indicated that he understood. At the sheriff's office, Coleman was again advised of his constitutional rights, after which he was asked by the trooper how much methamphetamine there was, to which Coleman replied, "seven-eighths."

Pursuant to state-required procedures, the trooper conducted an inventory search of Coleman's vehicle, which turned out to be registered to another individual. The search yielded the cutting tray, two plastic packages of syringes, two sets of measuring scales, multiple plastic bags, a funnel, and a bottle of Lidocaine (a cutting agent). Some of the items were in the back seat of the passenger compartment and some of the items were in a suitcase in the trunk. A. Legality of Initial Stop

Coleman's first contention on appeal is that the evidence seized should have been suppressed because his initial stop was illegal. Coleman asserts that the stop was illegal because the trooper testified that he had only a "hunch" or a "suspicion" that Coleman was not wearing a seat belt and that such a hunch or suspicion was not enough to warrant stopping him. He in turn argues that his stop was a "subterfuge" because the record is silent as to whether he was actually violating a Texas traffic law.

The initial stop was legal. The trooper did not testify as to a "hunch" or a "suspicion." He testified that he drove alongside the vehicle that Coleman was driving and "saw that he wasn't wearing a seat belt." He also testified that when the car first passed by him, he noticed "that the driver was not wearing a seat belt." He never testified that he had nothing more than a hunch that the driver was not wearing a seat belt.

Based on the testimony that he observed Coleman in violation of the state's safety belt law, the trooper had probable cause to stop the vehicle. United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991) (citing relevant provisions of Texas state law authorizing warrantless arrest of traffic violators). The fact that the record does not reflect whether Coleman was actually wearing a seat belt is a function of two factors, neither of which affects the validity of the stop itself. Before the trooper could get to the vehicle on foot, Coleman got out of

it. Thus, the record cannot possibly reflect any confirmation of Coleman's actual violation of the state law, other than the observations the trooper had already made before stopping him. Second, in response to similar contention in Colin, this court observed: "Given the subsequent discovery of a sawed-off shotgun and two outstanding arrest warrants, it is understandable that [the trooper] lost interest in minor traffic violations."Id. The fact that there is no objective verification of Coleman's violation of the seat belt law does not affect the validity of the stop under the facts of this case. Id. B. Miranda Warnings.

Coleman also contends that he was interrogated without having been given his Miranda warnings. Specifically, he asserts that his answers to the question about what was on his wrist and to the later question about how much methamphetamine he possessed were inadmissible statements. Miranda requires that a person subjected to custodial interrogation be warned of his right to remain silent, that anything he says may be used against him in a court of law, and that he has the right to the presence of an attorney. 384 U.S. at 479. A person is "in custody" for purposes of Miranda when a reasonable person in the same position would have understood the situation to constitute

---

1 Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

a restraint of his freedom to the degree which the law associates with formal arrest. United States v. Bengivenga, 845 F.2d 593, 596 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988). Police officers need not arrest someone the moment that probable cause arises. "Regardless of the presence of probable cause, until an officer acts to exert some type of restraint a suspect cannot reasonably believe her freedom is restrained." Id. at 596-97.

Coleman was not in custody" for purposes of Miranda when the state trooper asked for Coleman's license, observed the package attached to his wrist, and asked Coleman, "What's that?" In Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Supreme Court held that an ordinary traffic stop does not render a motorist in custody. In Berkemer, the court noted that traffic stops are presumptively brief, that motorists expect to be detained only for a few minutes while license or registration papers are verified, and that traffic stops are not particularly subject to the hazard of overbearing police interrogation procedures. Id. at 437-48. Asking Coleman what he had attached to his arm did not require the giving of Miranda warnings.

Concerning the statement made at the sheriff's office about the quantity of methamphetamine Coleman possessed, the trooper testified that he gave Miranda warnings to Coleman at the roadside when he formally placed him

under arrest and again at the station before he asked Coleman how much methamphetamine he had. At trial, the student observer who accompanied the trooper testified that he was present when the Miranda warnings were initially given at the time of Coleman's arrest and when they were given again at the station prior to Coleman's answering the question concerning the amount of methamphetamine. There was no testimony to the contrary, no reason to conclude that Coleman had not been given Miranda warnings prior to his statement at the station, and thus, no reason to suppress his response to that statement.

C. Ownership of the Vehicle

Next, Coleman contends that the district court should not have permitted the introduction of the evidence of the drug paraphernalia found in the car because he was driving a borrowed vehicle and there was no indication that the drug paraphernalia belonged to him or that he had any knowledge of its presence in the vehicle.

When knowledge is an element of the offense, as it is in this case regarding drug possession, United States v. Williams-Hendricks, 805 F.2d 496, 500 (5th Cir. 1986), the evidence seized may be introduced as circumstantial proof of knowledge. The law recognizes that even if Coleman did not own the car or the paraphernalia contained within the car he still had sole control over the car

and its contents at the time he was driving it. Dominion and control may be sufficient to demonstrate knowing possession. See United States v. Martinez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989). As a result, ownership of items is irrelevant to their admissibility regarding the issue of possession. See United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986), cert. denied, 481 U.S. 1004 (1987).

D. Lawful Possession of a Firearm

Finally, Coleman contends that the district court should have granted his motion for judgment of acquittal on the firearms charge because his possession of the weapon was lawful under state law.

Coleman relies on a provision of Texas law which excepts one who is "traveling" from the prohibition of carrying a handgun on or about his person. See Tex. Penal Code Ann. § 46.02(a) and 46.03 (a) (3) (Vernon 1989). He asserts that, because he was on an interstate highway in one county and he resided in another county, he was "traveling" and thus had lawful possession of the firearm under state law. Therefore, argues Coleman, these facts compel the conclusion that he could not be convicted of carrying or using a firearm during or in relation to a drug trafficking offense .

The predecessor provision to 18 U.S.C. § 924(c) required proof that the firearm was carried during the commission of a federal felony plus the

additional proof that the act of carrying the firearm violated an independent local, state or federal law. United States v. Prieto-Tejas, 779F.2d 1098, 1104 (5th Cir. 1986). Thus, if the independent violation was based on carrying a gun in violation of § 46.02, noted above, and the defendant proved that he fell within the § 46.03 traveler's exemption under state law, there was no proof of a violation of an independent provision. See id. But the amended version of § 924(c)(1) that is currently in effect and applicable to Coleman no longer requires that the possession of the firearm be illegal independent of its involvement in the drug trafficking offense. United States v. Boyd, 885 F.2d 246. 249 (5th Cir. 1989) . As such, Coleman's facially lawful possession of the pistol under law is irrelevant to his violation of § 924(c)(1). His argument to the contrary fails.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-1972

U.S. COURT OF APPEALS
FILED
SEP 18 1991
GILBERT F. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TERRY DEWAYNE COLEMAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING

(September 18, 1991)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

§ 1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub. L. 100-352, § 2(a), (b), 102 Stat. 662.)

Complete Annotation Materials, see Title 28 U.S.C.A.

CHAPTER 83—COURTS OF APPEALS

Editorial Notes

Codification. Section 236(b) of Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2667, amended the table of sections by inserting the following item:

1293. Bankruptcy appeals.

Section 113 of Pub.L. 98-353, July 10,1984, 98 Stat. 343, (effective June 27, 1984 pursuant to section 122(c) of Pub.L. 98-353) provided that this amend ment "shall not be effective". Section 121 of Pub.L. 98-353 (effective on July 10,1984 pursuant to section 122(a) of Pub.L. 98-353) provided that this amendment shall take effect on July 10, 1984.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Oct. 31,1951, c. 655, §48, 65 Stat. 726; July 7,1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2,1982, Pub.L. 97-164, Title 1, § 124, 96 Stat. 36.)

Complete Annotation Materials, see Title 28 U.S.C.A.

§ 46.02. Unlawful Carrying Weapons

(a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.

(b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.

(c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages.

Acts 1973, 63rd leg., p. 883, ch. 399, 1, eff. Jan. 1,1974.

§ 46.03. Non-Applicable

(a) The provisions of Section 46.02 of this code do not apply to a person:

(1) in the actual discharge of his official duties as a member of the armed forces or national guard or a guard employed by a penal institution;

(2) on his own premises or premises under his control unless he is an employee or agent of the owner of the premises and his primary responsibility is to act in the capacity of a security guard to protect persons or property, in which event he must comply with Subdivision (5) of this subsection;

(3) traveling;

(4) engaging in lawful hunting, fishing, or other sporting activity if the weapon is a type commonly used in the activity;

(S) who holds a security officer commission issued by the Texas Board of Private Investigators and Private Security Agencies, if:

(A) he is engaged in the performance of his duties as a security officer or traveling to and from his place of assignment;

(B) he is wearing a distinctive uniform; and

(C) the weapon is in plain view; or

(6) who is a peace officer, other than a person commissioned by the Texas State Board of Pharmacy.

(b) The provision of Section 46.02 of this code prohibiting the carrying of a club does not apply to a noncommissioned security guard at an institution of higher education who carries a nightstick or similar club, and who has undergone 15 hours of training in the proper use of the club, including at least seven hours of training in the use of the club for nonviolent restraint. For the purposes of this section, "nonviolent restraint" means the use of reasonable force, not intended and not likely to inflict bodily injury.

Wearing safety belts required

Sec. 107C.

(a) In this section, "passenger car" includes a truck with a manufacturer's rated carrying capacity of not more than 1,500 pounds.

(b) A person commits an offense if the person:

(1) is at least 15 years old;

(2) is riding in the front seat of a passenger car while the car is being operated on a road, street, or highway of this state;

(3) is occupying a seat that is equipped with a safety belt; and

(4) is not secured by a safety belt.

(c) A person commits an offense if the person:

(1) operates on a road, street, or highway of this state a passenger car that is equipped with safety belts; and

(2) allows a child who is at least four years old but less than 16 years old to ride in the front seat of the car without requiring the child to be secured by a safety belt.

(d) A passenger car or a seat in a passenger car is deemed to be equipped with a safety belt if the passenger car is required under Section 139E of this Act to be equipped with safety belts.

(e) An offense under this section is punishable by a fine of not less than $25 nor more than $50.

(f) This section does not apply to a person who possesses a written statement from a licensed physician stating that for medical reasons the person is unable to wear a safety belt.

(g) It is a defense to prosecution under this section that the person presents to the court, not later than the 10th day after the date of the offense, a statement from a licensed physician stating that for medical reasons the person is unable to wear a safety belt.

(h) This section does not apply to persons employed by the United States Postal Service while performing duties for that federal agency which require the operator to service postal boxes from their vehicles or which require frequent entry into and exit from their vehicles.

(i) The department shall develop and implement an educational program to encourage the wearing of safety belts. The program shall emphasize:

(1) the effectiveness of safety belts and other restraint devices in reducing the risk of harm to passengers in motor vehicles; and

(2) the requirements of this section and the penalty for noncompliance.

(j) Use or nonuse of a safety belt is not admissible evidence in a civil trial.

Sec. 107C added by Acts 1985, 69th Leg., ch. 804, 1, eff. Sept. 1,1985.

Safety belts

Sec. 139E. Every motor vehicle required by Article XV of this Act to be inspected shall be equipped with front safety belts where safety belt anchorages were part of the manufacturer's original equipment on the vehicle. Sec. 139E amended by Acts 1985, 69th leg., ch. 804, § 2, eff. Sept. 1,1985.

§ 924 Penalties

(a)(1) Except as otherwise provided in paragraph (2) or (3) of this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever -

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (a)(6), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922 (1); or

(D) willfully violates any other provision of this chapter, shall be fined not more than $5,000, imprisioned not more than five years, or both.

(2) Whoever knowingly violates subsection (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined not more than $1,000, imprisoned not more than one year, or both.

(4) Whoever violates section 922 (q) shall be fined not more than $5,000, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined

not more than $10,000, or imprisoned not more than ten years, or both.

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, shortbarreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person

sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 951 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(1), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of

any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, the seized firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the

court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(8), 922(a)(6), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(6), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect

to the sentence imposed under this subsection.

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the first section or section 3 of Public Law 96-350 (21 U.S.C. 955a et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum te rm of imprisonment of ten years or more is prescribed by law; (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)), travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)), shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

§ 841 Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl) 4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl - N[1-(2-phenylethyl)-4-piperidinyl] propanemide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results

from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that

prohibits or restricts conduct relating to narcotic drugs, marihuana, or depres sant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N[1-2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N[1(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or sub stance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be

less than 6 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition

to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life

imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $ 2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 60 kilograms of marihuana, except in the case of 50 or more marihuana plans regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or

$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a

violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this

paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18, or imprisoned not more than five years, or both

(c) Repealed. Pub.L. 98-473, Title II, 224(a)(2), Oct. 12,1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations

issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property; penalties; definitions

(c)(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

(g)(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

(Pub.L. 91-513, Title II, Sec. 401, Oct. 27, 1970, 84 Stat. 1260, Pub.L. 95-633, Title II, Sec. 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, Sec. 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, Secs. 224(a), 502, 503(b(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 98-473, 224(a), as amended Pub.L. 99-570, Title I, g 1005(a), Oct. 27, 1986, 100 Stat. 3207-6; Pub.L. 99-570, Title I, Secs. 1002, 1003(a), 1004(a), 1103, Title XV, Sec. 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, Secs. 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4382, Pub.L. 101-647, Title X, Sec. 1002(e), Title XII, Sec. 1202, Title XXXV, Sec. 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932.)

Subsecs. (b)(4) and (c) of this Section Applicable to Offenses Committed Prior to Nov. 1, 1987

Subsecs. (b)(4) and (c) of this section as in effect prior to amendment by Pub.L. 98-473, Sec. 224(a), read as follows:

(b) Penalties

Except as otherwise provided in section 845, 845a, or 845b of this title [now section 859, 860, or 861 of this title], any person who violates subsection (a) of this section shall be sentenced as follows:

> (4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(c) Special parole term

A special parole term imposed under this section or section 845, 845a or 845b of this title [now section 859, 860, or 861 of this title] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new

term of imprisonment. A special parole term provided for in this section or section 845, 845a or 845b of this title [now section 859, 860, or 861 of this title] shall be in addition to, and not in lieu of, any other parole provided for by law.

[See Codification notes below.]

For applicability of sentencing provisions to offenses, see Effective Date and Savings Provisions, etc., note,section 235 of Pub. L. 98-473, as amended, set out under section 3551 of Title 18, Crimes and Criminal Procedure.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
NOV 2 1990
NANCY DOHERTY, CLERK
By _____ Deputy

AO 245 S (Rev. 9/88) Judgment in a Criminal Case

United States District Court

NORTHERN District of — TEXAS
ABILENE DIVISION

Certified as a true copy on
This Date 11-2-90
By _____ Deputy Clerk

UNITED STATES OF AMERICA
V.
TERRY DEWAYNE COLEMAN
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR-1-90-001-C

Gerald Lopez
Defendant's Attorney

THE DEFENDANT

☐ pleaded guilty to count(s) _____
☒ was found guilty on count(s) 1 and 2 after a plea of not guilty

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1) and 841(b)(1)(C)	Possession with Intent to Distribute Methamphetamine, a Class C felony	11/22/89	one (1)
18:924(c)(1)	Carrying a Firearm During a Drug Trafficking Offense, a Class D felony	11/23/89	two (2)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is/are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 100.00 for count(s) 1 and 2, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. 465-90-0776

Defendant's Date of Birth 10/07/54

Defendant's Mailing Address:
Lubbock County Jail
Lubbock, Texas

Defendant's Residence Address:
c/o Mr. and Mrs. O.W. Coleman
HC 64, Box 128
Big Lake, Texas

November 2, 1990
Date of Imposition of Sentence

Signature of Judicial Officer

SAM R. CUMMINGS, United States District Judge
Name & Title of Judicial Officer

November 2, 1990
Date

AO 245 S (Rev. 4/90) Sheet 2 - Imprisonment

Defendant: Terry Dewayne Coleman
Case Number: CR-1-90-001-C

Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty three (33) months on count 1, and sixty (60) months on count 2, consecutive to the sentence imposed on count 1.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States marshal.

The defendant shall surrender to the United States marshal for this district:

at ____ a.m. / p.m. on _____

as notified by the United States marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States marshal.

as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: Terry Dewayne Coleman
Case Number: CR-1-90-001-C

Judgment—Page 3 of 5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

Three (3) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☐ The defendant shall not possess a firearm or destructive device.

2. You shall not commit any crimes, federal, state or local.
3. You shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.
4. You shall not possess a firearm or other dangerous weapon.
5. You shall participate in a drug aftercare program under the direction of the probation officer for treatment of narcotic addiction or drug dependency which may include testing to determine if you have reverted to the use of drugs.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

• U.S. GPO: 1990 727-448-10288

AO 245 S Rev 4/90 Sheet 5 - Fine

Defendant: Terry Dewayne Coleman
Case Number: CR-1-90-001-C

Judgment—Page 4 of 5

FINE

The defendant shall pay a fine of $ _____ The fine includes any costs of incarceration and/or supervision

☐ This amount is the total of the fines imposed on individual counts, as follows:

No fine is assessed.

☐ The court has determined that the defendant does not have the ability to pay interest It is ordered that:

☐ The interest requirement is waived
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid
☐ in full immediately
☐ in full not later than _____
☐ in equal monthly installments over a period of _____ months The first payment is due on the date of this judgment Subsequent payments are due monthly thereafter
☐ in installments according to the following schedule of payments

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed See 18 U S C § 3614

o U S GPO 1990 722 449 10288

AO 2-3 S (Rev. 4/90) Sheet 7 - Statement of Reasons

Defendant: Terry Dewayne Coleman
Case Number: CR-1-90-001-C

Judgment—Page 5 of 5

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 27 to 33 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 1,000,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

ABILENE DIVISION

UNITED STATES OF AMERICA

VS. No. CR 1-90-0021

TERRY DEWAYNE COLEMAN

NOTICE OF APPEAL

PLEASE TAKE NOTICE:

TERRY DEWAYNE COLEMAN, does hereby give notice of appeal to the United States Court of Appeals for the Fifth Circuit from the Sentence and Judgment entered herein on the 2nd day of November 1990.

Respectfully submitted,

GERALD R. LOPEZ
Attorney At Law
Suite 825, 419 W. 4th St.
Odessa, Texas 79761
State Bar Number 12564000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing NOTICE OF APPEAL was mailed to the offices of the United States Attorney Room C-201, 1205 Texas Avenue Lubbock, Texas 79401-4094 on November 7, 1990.

GERALD LOPEZ